

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 2000-O-09

DATE ISSUED: July 17, 2000

ISSUED TO: Ellen Elder, President, Hettinger Public School
District Board

CITIZEN'S REQUEST FOR OPINION

On June 2, 2000, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Joey Hedstrom of the Adams County Record asking whether the Hettinger Public School District Board violated N.D.C.C. § 44-04-19 by holding an executive session to discuss contract negotiation strategy which was not authorized by law.

FACTS PRESENTED

The Hettinger Public School District Board (Board) held a special meeting on May 30, 2000. The only item listed on the agenda of the May 30 meeting was discussion of administrative salaries and benefits.¹ The minutes of the meeting do not indicate the legal authority for the executive session or the times the session began and ended. See N.D.C.C. § 44-04-19.2(4). However, in its response to this office's inquiry, the Board indicates that its executive session was based on the exception in N.D.C.C. § 44-04-19.1(7) for discussions of negotiation strategy for contracts which are currently being negotiated. The Board is currently negotiating new contracts for the school district's superintendent, secondary principal, and elementary principal.

The executive session lasted roughly 90 minutes and was tape recorded in compliance with N.D.C.C. § 44-04-19.2(5). The recording has been reviewed by this office.

¹ The notice failed to indicate that this discussion might occur in an executive session. See N.D.C.C. § 44-04-20(6) (a special meeting must be limited to the topics included in the notice of the meeting)

ISSUE

Whether the executive session of the Board was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

ANALYSIS

School board meetings must be open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-19; 2000 N.D. Op. Att'y Gen. O-18 (Apr. 4 to Larry Gegelman). The Board relies on the following provision as authority for its executive session on May 30:

A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding . . . contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.

N.D.C.C. § 44-04-19.1(7).

This subsection does not authorize an executive session for all contract discussions. 2000 N.D. Op. Att'y Gen. at ¶20. Rather, "[t]he terms 'strategy' and 'instructions' are key terms which limit the application of N.D.C.C. § 44-04-19.1(7)." Id. In addition, a meeting may be closed under this subsection "only if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity." 1999 N.D. Op. Att'y Gen. O-1, O-2 (Feb. 22 to Howard Swanson).

Essentially, there are three elements to the exception to the open meetings law in N.D.C.C. § 44-04-19.1(7):

- 1) Discussion of negotiating strategy or providing negotiation instructions to the governing body's attorney or negotiator;
- 2) Litigation, adversarial administrative proceedings, or contracts which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future;
- 3) An adverse fiscal effect on the public entity's bargaining or litigation position if the meeting was open to the public.

All three elements must be present for a governing body to properly close a meeting under N.D.C.C. § 44-04-19.1(7). The question presented in this opinion involves the first and third elements of the exception.

Turning to the recording of the executive session in this case, one member of the Board asked near the beginning of the executive session whether the executive session was to evaluate the administrators' job performance or to discuss negotiation strategy. This was an appropriate question to ask, because although there is an exception to the open meetings law for negotiation strategy sessions, there is no such exception for evaluations of the administrators.² Unfortunately, the recording of the executive session reveals that most of the executive session was, in fact, an evaluation of the administrators' job performance rather than a discussion of "strategy" or "instructions" regarding the Board's bargaining position in the pending contract negotiations with the administrators.

The session began with an announcement of the Board's prior offer and the counter-offer from the administrators. Some time later, a Board member identified the difference between the two offers. Had these brief remarks been made in the context of commenting on the strengths or weaknesses of the Board's negotiating position, it would have been proper to close the portion of the meeting during which those remarks were made. But here, the remarks were isolated reminders and updates to the Board members on the status of negotiations which were made in the middle of a discussion which was otherwise required to be open to the public. Since the administrators were well aware of the two offers that had been made, and the difference between the two offers, disclosure of the remarks could not have an adverse fiscal effect on the Board's bargaining position and those remarks should have been made in the open portion of the meeting. See 2000 N.D. Op. Att'y Gen. at 0-21 (update on status of contract negotiation may not be closed under N.D.C.C. § 44-04-19.1(7)).

² The exceptions to the open meetings law for reviews of school superintendents and principals are quite limited. See N.D.C.C. §§ 15-47-38, 15-47-38.1. Generally, these exceptions apply only when a school board is contemplating discharge or nonrenewal of the superintendent or principal, and not to all discussions of the job performance of those school administrators. Id. C.f. 1981 N.D. Op. Att'y Gen. 118 (Apr. 15 to Kent Alm) (statute authorizing an executive session for consideration of appointment or removal of university president does not apply to general discussions of the president's performance). These statutes were not listed as legal authority for the Board's executive session on May 30.

Responding to the reference to the difference between the two offers, a member of the Board admitted that the executive session was not about the money. The job performance of the administrators is certainly pertinent to a pay raise for those administrators, and thus is marginally relevant to a discussion of negotiation strategy on how much of a raise or cost of living increase to offer to the administrators, but not to the extent that the Board discussed during this executive session. In fact, a significant portion of the executive session was a discussion of a specific teacher and the review of that teacher by one of the administrators.

After stating that the executive session was not about the money, the same board member referred to the position of another Board member on the raises. That Board member then expressed a position on the raises and the trend of administrative salaries. These items of discussion were appropriately held in executive session. However, immediately thereafter, the topics of discussion turned to board member interaction and the administrators' job performance, which should have been open to the public.

A few minutes later, one member mentioned the increase of an administrator in another school. This was followed by a response from another Board member about the trend of administrative salaries and a comparison with statewide salaries. This discussion was properly closed. However, after this response was given, one member asked another whether there was anything else the member wanted to address in executive session. Beginning with that question, the discussion no longer pertained to negotiation strategy or instructions and should have been open.

Quite a bit later, in the middle of the executive session, a Board member stated the member's position on the raise each administrator had earned over the past year. This isolated remark, which included brief references to the administrators' job performance, was appropriate to make in executive session under N.D.C.C. § 44-04-19.1(7). The remainder of the first two-thirds of the executive session, roughly 60 minutes, consisted of job evaluations and other discussions which did not pertain to negotiation strategy or instructions and should have occurred in an open meeting.

Toward the end of the executive session, President Elder asked "how do we want to approach this?" From that point forward, the discussion pertained to the Board's response to the administrators' counter-offer, and was properly closed, until Ms. Elder started to talk about the administrators' responsibilities. At that point, the discussion then turned again to job performance and board member interaction which should have been open. Some minutes later, Ms. Elder asked again what direction the Board wanted to give on talking with the administration. From that point forward, the discussion pertained to negotiation strategy through a remark from

Board Member Uecker about the administrators' performance in the last year. However, after that remark, the discussion returned to the evaluation of a particular teacher rather than negotiation strategy. From that point until Board Member Uecker once again commented on the administrators' performance in the last year and the raise he felt the administrators deserved, the discussion should have been open. The remainder of the executive session, starting with that comment, was properly closed.

It appears from the recording that the main motivation for the executive session was not to protect the bargaining position of the school in its negotiation, but to encourage a candid and open discussion of the job performance of the administrators. Given the sensitive subjects discussed during the executive session, and the internal disagreement among the members of the Board, the preference of a majority of the Board for holding that discussion in executive session is understandable. However, as summarized in the preceding paragraphs, most of the Board's discussion did not pertain to the pending contract negotiations and thus does not fall under N.D.C.C. § 44-04-19.1(7) or under any other exception to the open meetings law. Even applying a liberal definition of contract negotiation "strategy" and "instructions," very little of the Board's discussion would negatively affect its fiscal position in the contract negotiation if it had occurred in an open meeting.

A governing body of a public entity may not close its evaluation of a public employee's job performance under N.D.C.C. § 44-04-19.1(7) simply because the discussion occurs in the context of determining whether to approve a raise or cost of living increase for the employee or determining the size of such a raise or increase. In this case, the meeting was closed for the purpose of discussing negotiation strategy. However, the closed portion of the meeting became an evaluation session instead. With the exception of the portions of the executive session summarized above as being properly held in executive session, it is my opinion that the executive session of the Board on May 30 was not authorized by law and should have been open to the public.

CONCLUSION

It is my opinion that the executive session held by the Board on May 30, except for the portions of the recording described in this opinion as being properly closed, did not pertain to contract negotiation strategy for which an executive session may be held under N.D.C.C. § 44-04-19.1(7), and therefore was held in violation of N.D.C.C. § 44-04-19.

STEPS NEEDED TO REMEDY VIOLATION

ATTORNEY GENERAL OPEN RECORDS AND MEETINGS OPINION
Hettinger Public School District Board
July 17, 2000
Page 6

The Board must disclose the recording of the executive session, except for the portions described in this opinion as being properly closed, to Ms. Hedstrom and to any other member of the public upon request as an open record. In lieu of excising the portions of the recording which were properly held in executive session, the Board may consider disclosing the entire recording, particularly if disclosure would no longer adversely affect its bargaining position in the negotiations.

Failure to disclose the record as described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General